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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY BRIAN BOWMAN,

Defendant and Appellant.

C087815

(Super. Ct. No. CH035075)

Appointed counsel for defendant Jerry Brian Bowman has asked this court to review the record to determine whether there exist any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436 (*Wende*)). Our review of the record has disclosed errors on the abstract of judgment and the trial court's failure to suspend rather than stay the parole revocation fine, which we will now correct. We affirm the judgment as modified.

I

We provide the following brief description of the facts and procedural history of the case. (See *People v. Kelly* (2006) 40 Cal.4th 106, 110, 124.)

The People filed a three-count information, charging defendant with battery by a prisoner on a nonprisoner (Pen. Code, § 4501.5; count one)¹ and two counts of resisting an executive officer (§ 69; counts two & three). The information further alleged as to all counts that defendant had suffered a prior serious or violent felony conviction (§ 667, subds. (b)-(i)) for robbery (§ 211). Defendant was arraigned, pleaded not guilty, and denied the special allegations.

Defendant's attorney expressed a doubt concerning his competency, and the court suspended proceedings and ordered a section 1368 competency evaluation. Following the court's review of a report by Dr. Amezaga, the court found defendant competent to stand trial and restored proceedings.

The trial court granted the People's request to shackle defendant premised upon a letter from the High Desert State Prison concerning defendant's risk given his classification score, and the court ordered shackles that were not visible to the jury.

At trial, the People presented testimony from correctional officers Steven Barton, Brent Schaake, and Liz Beth Romo-Echevarria. These officers collectively testified that defendant was unhappy with being told that he was going to have to share his cell with a white prisoner, started walking down a hall towards the yard door, refused orders from both Officers Barton and Romo-Echevarria to stop,² and dipped his shoulder and pushed through Officer Romo-Echevarria's shoulder to get out to the yard. Defendant ultimately

¹ Undesignated statutory references are to the Penal Code.

² Defendant was wearing a vest that indicated he had a hearing impairment, but Officer Barton's interaction with him prior to the incident did not indicate defendant had any difficulty hearing Officer Barton. This is consistent with the investigating officer's perception of defendant's ability to understand him. In fact, Officer Romo-Echevarria testified concerning various statements by defendant that he was going to the yard, to get out of his way, and that defendant shook his head at Officer Barton, who was ordering him to stop. Defendant also conceded that he heard the orders from both Officers Barton and Romo-Echevarria.

assumed a prone position on the ground, but then refused to offer his hands for handcuffing, actively keeping them beneath his body and pushing himself up on his hands. Because of this, Officer Barton had to use both hands to forcefully extract defendant's right hand from under his body for handcuffing. Another officer extracted the other hand.

Defendant testified in his defense that he only had a verbal altercation with Officer Barton wherein he told Barton that his ADA status kept him from being housed "on the top tier," that Barton nevertheless instructed him to go to the top tier, and defendant told Barton he would be following up with a "higher authority." Defendant complained he had had headaches, suffered from seizures, and had no hearing in his right ear.

Defendant admitted that Officer Barton told him to stop, but defendant refused because he wanted to appeal Barton's decision regarding his housing. Defendant further admitted that Officer Romo-Echevarria held up her hand and told him to stop, but he told her, "Don't touch me," and "I'm trying to talk to the higher authorities." Officer Romo-Echevarria put defendant against the wall, and his knees gave out. He complied with the order to prone out on his stomach and awaited further instructions until they handcuffed him. He complied with orders to put his hands behind his back. He denied fighting with the officers or refusing to provide his hands for handcuffing. On cross-examination, defendant was impeached with his two prior convictions for robbery and one prior conviction for false imprisonment.

Following instruction and argument, the jury found defendant guilty on all counts, and in a bifurcated proceeding, also found true the allegation that he had suffered the prior strike.

Following a review of the probation report, the record, and argument of counsel, the trial court sentenced defendant to an aggregate prison term of six years to run consecutive to any time defendant was then serving. This was comprised of the midterm of three years, doubled to six years because of the prior strike for count one. The court

imposed the midterm of two years doubled to four years for the strike prior on count two and then stayed this count pursuant to section 654. Finally, the court imposed a concurrent midterm of two years doubled to four years for the strike prior for count three. The court imposed a \$300 restitution fine (§ 1202.4, subd. (b)) and a \$300 stayed parole revocation fine (§ 1202.45). The court waived the court operation fees in the interest of justice and refused to impose the recommended \$600 in costs for the probation report. Because defendant committed the instant offenses while in prison, he was not entitled to any custody credits.

Defendant timely appealed.

II

Counsel filed an opening brief that sets forth the facts of the case and requests that we review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.) Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief, but to date has not done so.

Our review of the record has disclosed that the trial court stayed, rather than suspended the parole revocation restitution fine. Because section 1202.45 mandates that this fine be suspended (§ 1202.45, subd. (c)), we can correct this error on appeal. (See, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 853-854 [Court of Appeal may correct errors associated with mandatory sentencing choices without the need to remand for further proceedings].)

Our review of the record has also disclosed errors on the abstract of judgment. The trial court should amend section No. 1 of the abstract to reflect a sentence of six years for count one, the stayed sentence of four years for count two, and a concurrent sentence of four years for count three. Further, the court should remove all references to section “667(b)-(i)PC” enhancements in section No. 3. This enhancement is already identified in section No. 4.

Finding no other arguable error that would result in a disposition more favorable to defendant, we affirm the judgment as modified.

DISPOSITION

We modify the judgment to suspend the parole revocation fine of \$300, rather than stay it (§ 1202.45, subd. (c)). We also direct the trial court to amend the abstract of judgment to correct certain clerical errors described herein. The amended abstract shall be forwarded to the Department of Corrections and Rehabilitation. The judgment is affirmed as modified.

/s/
RAYE, P. J.

We concur:

/s/
ROBIE, J.

MAURO, J.